

**Lisa C. Oshiro
Directing Attorney
California Indian Legal Services**

**Testimony
before the Committee on Resources
United States House of Representatives**

**Legislative Hearing on S. 1721, “A bill to amend the Indian Land Consolidation Act
to improve provisions relating to probate of trust and restricted land,
and for other purposes.”**

June 23, 2004

Chairman Pombo and distinguished members of the House Committee on Resources, on behalf of California Indian Legal Services, I thank you for this opportunity to address you on S. 1721, the American Indian Probate Reform Act of 2004, and other proposed amendments to the Indian Land Consolidation Act. The issues addressed by the Indian Land Consolidation Act and the proposed amendments in S. 1721 are very important to preserve the Indian land base throughout Indian Country and especially the very limited Indian land base in California.

Introduction

California Indian Legal Services (CILS), a law firm devoted exclusively to the representation of Indian people and Tribes, submits these comments based upon the collective experience of the firm over a period of thirty-seven years. CILS was incorporated in 1967 by public interest attorneys and California Indian leaders. When it was created, CILS became the first non-profit law firm in the history of the United States devoted exclusively to representing the rights of Indian tribes and individual Indians. Over the years, CILS has had remarkable successes – ranging from the creation of the Native American Rights Fund to cases before the Supreme Court, the Ninth Circuit, other federal courts and state courts.

CILS has represented most of California's 107 federally recognized tribes during its existence and has served as counsel in many successful cases resulting in the restoration of improperly terminated California Indian rancherias. CILS has also represented many California Indian tribes in their legislative efforts, often successful, to restore their rightful status as recognized tribes. In addition, CILS has represented over 30,000 California Indians in matters such as Indian status, land status, and probate. As general counsel to the Advisory Council on California Indian Policy, CILS helped publish the most comprehensive report on the history and status of California Indians ever commissioned by the United States Congress.¹ Our historical role in California Indian affairs provides CILS with a clear perspective on how the probate provisions in the 2000 amendments to the Indian Land Consolidation Act would adversely impact California Indians, as well as on how S. 1721 eliminates those adverse impacts and would be beneficial for the California Indian community. Moreover, because we have a long history of representing tribes and individuals, CILS understands the sometimes competing nature of individual and tribal interests, and what policies strike a reasonable balance between such interests.

The Indian Land and Natural Resource Base in California

With 107 federally recognized tribes in California, one might expect the Indian land base in California to be substantial. However, the Indian land base in California is extremely small.

¹Congress commissioned exhaustive reports that detailed the tragic history and its remaining effects on California Indians. See, Advisory Council on California Indian Policy, Final Reports and Recommendations to the Congress of the United States Pursuant to Public Law 102-416, September 1997.

The reservations and rancherias under the jurisdiction of the Pacific Region Office² consist of approximately 400,000 acres of land held in trust for the benefit of California Indian tribes. An additional 63,000 acres of public domain and reservation allotments are held in trust for the benefit of individual California Indians.³ By contrast, the eighteen unratified treaties between the United States and California Indian tribes would have reserved approximately 8.5 million acres of Indian land in California.⁴

Some federally recognized tribes in California have no tribal land base whatsoever.⁵ Many of the reservations and rancherias in California are extremely small: most are less than 500 acres; 22 are 100 acres or less and, of these, 16 are 50 acres or less; seven are 20 acres or less; five are under 10 acres; and four are under five acres.⁶ Only 11 California Indian tribes have a land base of over 10,000 acres.⁷ This lack of land stems, at least in part, from Congress' failure to ratify negotiated treaties, the termination of California Indian tribes under the California Rancheria Act of 1958, as amended, and their partial restoration.⁸

Effect on Indian Elders in California

California Indian elders are a remarkable group of survivors. Beyond the ravages of the Mission Period and the Gold Rush era, California Indians have survived the unrelenting antipathy, until recent times, of the State of California to its native people, as well as a federal government that seemed intent on terminating their status or refusing to recognize their existence. Despite some of the poorest treatment and the most sordid history native people in the

² This does not include the three reservations that straddle the California/Arizona border, which are under the jurisdiction of the Phoenix Area Office. Bureau of Indian Affairs, Sacramento Area Office, "Trust Acreage - Summary, CY Ending December 31, 1996."

³ Id.

⁴ See Flushman and Barbieri, Aboriginal Title: The Special Case of California, 17 Pac. L.J. 390, 418 (1986) at 403-404.

⁵ See Table 1 to the ACCIP Economic Development Report.

⁶ Id.

⁷ The ACCIP Trust and Natural Resources Report, at pp. 11-12.

⁸ The ACCIP Historical Overview Report: The Special Circumstances of California Indians," at p. 5,13; See, e.g., The ACCIP Termination Report: The Continuing Destructive Effects of the Termination Policy on California Indians."

United States have ever experienced, California Indian elders have managed to remain Indian, survive as members of communities they have kept alive and vibrant against all odds, and have kept almost one-half million acres of individual and tribal lands in trust. California Indian elders find themselves once again fighting to maintain their existence as Indians and fighting to keep their precious limited land base.

The California Indian community needs S. 1721 enacted into law rather than allowing the probate code and related provisions of the 2000 amendments to the Indian Land Consolidation Act to become effective. Serving many Tribes and elders, CILS is in a unique position to gauge the effect of the 2000 amendments on the California Indian elder population and we regret to report that the uncertainty occasioned by the 2000 amendments to the Indian Land Consolidation Act has created great distress among California Indian elders. No other recently enacted piece of federal legislation has caused as much anguish and fear among the American Indian community, especially our elders.

Since the passage of the 2000 amendments to the Indian Land Consolidation Act, Indian elders in California who possess interests in trust allotments have been under significant stress and discomfort – because the definition of “Indian” and limitations in the probate provisions of the 2000 amendments would have the effect of preventing them from leaving their lands to many of their children, grandchildren, and great-grandchildren in trust.

The 2000 amendments changed the definition of “Indian” to mean:

“any person who is a member of any Indian tribe or is eligible to become a member of any Indian tribe, or any person who has been found to meet the definition of 'Indian' under a provision of Federal law if the Secretary determines that using such law's definition of Indian is consistent with the purposes of this chapter.”

The above definition is especially troubling for current owners of off-reservation trust and restricted lands in California, generally public domain allotments, who are not members of federally recognized tribes, but are members of tribes which were terminated and are undertaking efforts to become restored; were previously recognized but not included on the Part 83 list of federally recognized tribes due to administrative oversight; or have petitioned for recognition and have either been waiting for many years on the ready list or are in other stages of processing their petitions for federal recognition with very limited resources.

While the definition of “Indian” in the 2000 amendments does not limit that term to members of any “federally recognized” tribe, but rather any “Indian tribe” which is more broadly defined to mean:

“any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds lands in trust;”

CILS has received many frantic calls from elders holding public domain allotments who were told by the Bureau of Indian Affairs following the passage of the 2000 amendments that their allotments would no longer be held in trust once the 2000 amendments became effective. Thus, while we would argue that these unrecognized tribes are “Indian communities for whose members the United States holds lands in trust,” there is apparent disagreement over such interpretation. There has also been a great amount of uncertainty about which limited definitions the Secretary would incorporate under the latter half of the 2000 definition of “Indian.”

The proposed definitions of “Indian” and “eligible heirs” in S. 1721 would provide both the Indian community and the Department of the Interior with greater certainty of who would qualify to hold and inherit interests in trust and restricted lands and would provide many California Indian elders with greater security in passing their interests to their lineal descendants in trust or restricted status.

Proposed S. 1721 Referred to the House Committee on Resources

Since its inception, CILS’ number one priority, as identified by the California Indian community, has been the preservation and enhancement of the Indian land base in California. This priority has led CILS to undertake significant efforts to ensure that some of the amendments to the Indian Land Consolidation Act enacted in 2000 be repealed or modified. To that end, CILS has worked closely with the Senate Committee on Indian Affairs since the 2nd Session of the 107th Congress, on S. 1721’s predecessor bill, S. 1340; and CILS has served as coordinators, along with organizations such as the Indian Land Working Group and the National Congress of American Indians, for an informal S. 1721 Task Force. The S. 1721 Task Force, a coalition representing tribal and individual Indian interests, has sought to fashion a fair and effective substitute bill in S. 1721 which balances the needs of individual landowners, Indian tribes, and the Department of the Interior.

CILS has assisted in coordinating numerous meetings, drafting sessions, discussion groups, community education forums and briefings. As a result of this significant effort by the national Indian community, the S. 1721 Task Force drafted and submitted a proposed substitute bill. Many of those provisions have made it into the current version of the bill with some provisions vastly improved through continued discussions and revisions and other provisions revised in attempts to strike a balance among the interests of Indian tribes, individual Indian landowners and the Department of the Interior.

There are times when we face what appear to be almost insurmountable challenges. Indian land fractionation has presented many problems and significant challenges since the 1930s. Such challenges often require communities to come together and aggressively take on those challenges by making tough decisions which reflect a great deal of deliberation and compromise. Everyone agrees that the current level of fractionation of trust and restricted lands,

and the associated management of the fractionated interests, pose massive problems for the owners of such interests (including Indian tribes), the Indian tribes with jurisdiction over such interests, and the Department of the Interior. S. 1721 has provided Indian Country with an opportunity for everyone to be a part of a solution which prevents further loss of trust and restricted lands, promotes the consolidation of fractionated interests in trust and restricted lands so that such lands and their resources may be protected and/or put to productive use for housing, schools, health clinics, cultural centers, economic development, and other community purposes. S. 1721 attempts to do all of these things while also respecting and protecting the rights and interests of individual landowners, and preserving and promoting the jurisdiction and sovereignty of Indian tribes.

The current version of S. 1721 reflects hundreds of hours of drafting, discussions and negotiations and an effort to bring together the collective knowledge, experience, resources, and vision of individual owners of trust and restricted interests, Indian tribes, tribal staff, consultants and advocates, Indian organizations, Congressional members and staff, and DOI officials and staff to provide solutions with immediate and long-term benefits throughout Indian Country. S. 1721 proposes important land consolidation measures which we would be happy to discuss separately in greater detail. However, the bill's probate code and related provisions were the focus of the California Indian community and thus CILS.

The centerpiece of S. 1721 is a more easily understood uniform federal probate code and its critical revision of the definition of "Indian" and addition of the definition of "eligible heirs." The proposed definition of "Indian" would include members and those eligible for membership in any Indian tribe and would also grandfather in all current owners of interests in trust or restricted lands as of the date of the enactment. The proposed definition of "eligible heirs" would include all Indians as well as their lineal descendants within two degrees of consanguinity. For Indian Country in general, these definitions working together would allow families to protect and preserve their trust and restricted lands for at least the current and next two generations while working together with their tribes to determine long-term plans and solutions for maintaining the trust and restricted status of those lands.

Due to the unique and special circumstances in California which are highlighted by the Advisory Council on California Indian Policy Reports, the proposed definition of "Indian" also includes a provision specifically applicable to the inheritance and ownership of trust and restricted lands in the State of California, providing for the continuing qualification of such owners as "Indian" for those purposes. Together with the proposed definition of "eligible heirs," successive generations of lineal descendants may continue to inherit and own interests in the limited trust and restricted lands in California.

These revisions and improvements to the uniform federal probate code will not slow fractionation or facilitate consolidation without appropriate estate planning and will drafting assistance. Thus, S. 1721 proposes solutions to assist the Department of the Interior in

encouraging estate planning throughout Indian Country through the assistance of tribal governments, Indian landowner organizations and Indian legal services programs. Indian families would be provided with more estate planning tools and services so that they may better manage their families' trust and restricted lands.

California Indian elders deserve the comfort and the certainty that their precious trust lands will remain in their families and will be passed on to future generations. Moreover, they deserve the right to live out their lives secure in the knowledge that, whether by will or by intestate succession, their lands will remain protected and in trust status. We therefore urge the House Committee on Resources to act quickly during this 108th Congress and restore confidence and certainty to the trust probate process.

Respectfully submitted,
CALIFORNIA INDIAN LEGAL SERVICES

Lisa C. Oshiro
Directing Attorney

Follow-Up Addresses

Lisa C. Oshiro
Directing Attorney
California Indian Legal Services
422 1st Street SE, #5, Fourth Floor
Washington, DC 20003
(202) 589-1860

Michael S. Pfeffer
Executive Director
California Indian Legal Services
510 16th Street, Fourth Floor
Oakland, CA 94612
(510) 835-0284